IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CELLULAR COMMUNICATIONS EQUIPMENT LLC,	§	
	§	Civil Action No. 6:13-cv-507-JRG-KNM
Plaintiff,	§	(lead consolidated case)
	§	JURY TRIAL DEMANDED
v.	§	
	§	Judge Rodney Gilstrap
HTC CORPORATION, et al.,	§	
	§	
Defendants.	§	

DEFENDANTS' MOTION FOR RECONSIDERATION OF AND OBJECTIONS TO MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER REGARDING CLAIM CONSTRUCTION

Pursuant to Fed. R. Civ. P. 72(a) and Local Rule CV-72(b), Defendants AT&T Mobility LLC, Amazon.com, Inc., Dell Inc., Exedea, Inc., Cellco Partnership d/b/a Verizon Wireless, Sprint Solutions, Inc., Sprint Spectrum L.P., Boost Mobile, Pantech Co., Ltd., Pantech Wireless, Inc., HTC Corporation, HTC America, Inc., T-Mobile USA, T-Mobile US, Inc., LG Electronics, Inc., LG Electronics, USA., Inc., ZTE Corporation, ZTE USA, Inc., and ZTE Solutions, Inc. ("Defendants") respectfully submit their objections to Magistrate Judge Mitchell's June 1, 2015 Memorandum Opinion and Order ("Order") (Dkt. No. 413) regarding U.S. Patent Nos. 8,055,820 ("the '820 Patent"), and 7,218,923 ("the '8923 Patent").[1]

I. THE '820 PATENT

Defendants respectfully object to the Order with respect to one claim term—"usage"—recited in Claims 1, 12, and 24 of the '820 Patent.

As set forth in Defendants' Responsive Claim Construction Brief (Dkt. No. 362), which is incorporated herein by reference, "usage" should be construed to mean "an act, way, or manner of using." The Order construes "usage" to have its "plain meaning." The parties dispute the breadth of the claim limitation that requires "monitoring ***a usage*** of a plurality of buffers." *See* Order at 5. Plaintiff contends that this limitation requires only "monitoring . . . a plurality of buffers." *Id.* at 4–5. Defendants, on the other hand, contend that "usage" is not superfluous and that this limitation requires monitoring the "usage" of the buffers as opposed to mere monitoring of the buffers. *Id.* at 5.

The Order's "plain meaning" construction does not resolve the parties' dispute as to the scope of this claim limitation. Where a "term has more than one 'ordinary' meaning or when reliance on a term's 'ordinary' meaning does not resolve the parties' dispute," determining that

[1] Each Defendant joins the brief only with respect to the claims asserted against that Defendant.

"a claim term 'needs no construction' or has the 'plain and ordinary meaning' may be inadequate." *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1361 (Fed. Cir. 2008). Even if a term has a "well-understood definition," a court should construe the term if the parties dispute its scope. *Id.*

As the Order acknowledges, "usage" is a "broad, generic term." *See* Order at 6. In its Reply Brief, however, Plaintiff conceded that there are definitions of "usage" that "obviously have no applicability" to the claim limitation at issue. *See* Plaintiff's Reply Claim Construction Brief at 1 (Dkt. No. 369). Defendants agree. As the parties agree that the scope of "usage" (as recited in Claim 1, 12, and 24) is something less than its full potential scope, this term is ripe for construction, and should be construed so as to settle the parties' dispute as to its proper scope. Otherwise, the burden will be placed on the jury to resolve that dispute during trial.

Furthermore, Defendants respectfully submit that the Order improperly discounted the specification, which expressly distinguished the specific, claimed technique of "monitoring the usage of buffers" from the more general technique of "monitoring the buffers." *See* Order at 6 ("Irrespective of whether or how the patentee intended 'monitoring a usage of . . . buffers' to be a narrower concept than 'monitoring buffers,' the intrinsic evidence suggests that the 'fact of being used' meaning of 'usage' should not be excluded from the meaning of the term."). However, the '820 Patent makes clear that the claimed "monitoring a usage of [buffers]" is narrower in scope than merely "monitoring buffers." *See* '820 Patent at 7:58–60 ("In certain embodiments, monitoring 310 buffers ***may include*** monitoring a usage of one or more communication buffers.") (emphasis added). Any interpretation that may permit monitoring a usage of the buffers to include merely monitoring the buffers is inconsistent with the distinction the patentee chose to set forth in the specification.

II. THE ’8923 PATENT

Defendants respectfully object to the Order with respect to one claim term—“tamper resistant”—recited in Claim 26 of the ’8923 Patent. As set forth in Defendants’ Responsive Claim Construction Brief (Dkt. No. 362), which is incorporated herein by reference, “tamper resistant” should be construed in light of the specification to mean “resistant to being affected by a user or other parties that are beyond the control of the network operator.” The Order construes “tamper resistant” to have its “plain meaning.”

In construing “tamper resistant,” the Order’s “plain meaning” construction reads the claim language in a vacuum without taking into account the specification. As the Order acknowledged, Defendants’ proposed construction is based on the specification of the ’8923 Patent and that the specification of the ’8923 Patent indicates that one purpose of the tamper resistant area is to prevent user or other parties that are beyond the control of the network operator from affecting the operation of the terminal. Order at 12-13. Yet, the Order found that the specification contains little guidance on the meaning of “tamper resistant.” *Id*. Defendants cited multiples portions of the specification of the ’8923 Patent that explain the meaning of “tamper resistant” in the context of the claims. Docket No. 362 at 14-15; *see* ’8923 Patent at 1:43-47; 2:3-6; 2:58-62; 2:65-67; 5:11-12; 7:1-3. Thus, contrary to the Order’s finding, the specification provides ample guidance on the meaning of “tamper resistant.”

Moreover, no evidence on the record contradicts Defendants’ proposed construction. To the contrary, all the embodiments described in the specification of the ’8923 Patent, including those that Plaintiff cited in support of its arguments, are consistent with Defendants’ proposed construction of “tamper resistant.” Docket No. 362 at 15-16. The intrinsic evidence on the record leads to the conclusion that the ’8923 Patent uses the phrase “tamper resistant” to mean

"resistant to being affected by a user or other parties that are beyond the control of the network operator."

The Order also found unclear how passages at 6:45-48 and 7:65-8:5 in the specification of the '8923 Patent—which explain that policy rules, certificates, and keys may be stored in the tamper resistant area in the manufacturing phase of the terminal—are relevant to the identities of those entities that have access to the tamper resistant area. Order at 13-14. Both passages clarify that, according to the specification of the '8923 Patent, manufacturers' access to the tamper resistant area is limited to the manufacturing phase of the terminal. Docket No. 362 at 15. Moreover, the surrounding context in the specification of the '8923 Patent explains that only network operators have access to the tamper resistant area after the terminal is manufactured. Docket No. 362 at 16; *see* '8923 Patent at 6:27-31. Both passages, when viewed in their proper larger context, confirm that the "tamper resistant" area is "resistant to being affected by a user or other parties that are beyond the control of the network operator."

III. CONCLUSION

For these reasons, Defendants respectfully request that the Court overrule the Magistrate Judge with respect to the terms "usage" and "tamper resistant" and adopt Defendants' proposed constructions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically in compliance with Local Rule CV-5 on this 18th day of June, 2015. As of this date, all counsel of record have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF system under Local Rule CV-5(a)(3)(A).

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